127-634

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 870. ~~535~~ 239

JOHN CALHOUN, RECEIVER OF THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA, AND HENRY DENIS, PLAINTIFFS IN ERROR,

vs.

GEORGE ALFRED LANAUX.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JUNE 26, 1885.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from civil district court	1	1
Petition	2	2
Mandamus	5	3
Sheriff's return	7	3
Order for mandamus	8	4
Act of sale annexed to petition	8	4
Exception of State of Louisiana	15	7
Return to mandamus	17	8
Answer of Forstall's sons *et al.*	19	9
Evidence	20	9
Testimony of John Calhoun	20	10
Judgment	23	11
Motion for appeal	24	12
Bond on appeal	25	12
Clerk's certificate	27	12
Order for summary docket	28	13
Order to submit	28	13
Order to submit	29	13
Hearing and submission	29	14

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	Original.	Print.
Final decree	30	14
Opinion	30	14
Petition for rehearing	33	15
Order granting rehearing	34	16
Submission on rehearing	34	16
Opinion on rehearing	35	16
Petition for writ of error	39	18
Document A—Order of C. C. U. S. in case of Cressey *vs.* Consolidated Association of the Planters of Louisiana	44	20
B—Order of C. C. U. S. in case of Cressey *vs.* Consolidated Association of the Planters of Louisiana	45	20
C—Order of C. C. U. S. in case of Cressey *vs.* Consolidated Association of the Planters of Louisiana	48	22
A—Notice that Leon Godchaux declines to take part in writ of error	51	23
Writ of error	51	23
Bond	53	24
Citation	55	25
Clerk's certificate	57	26
Chief Justice's certificate	58	26

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No. 9164.

Supreme Court of Louisiana.

Filed February 18th, 1884.

GEORGE W. DUPREE, *Clerk.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

G. A. LANAUX, Appellant,
vs.
RECORDER OF MORTGAGES, Appellee. } No. 10449.

Charles F. Claiborne, Esq., attorney for plaintiff & appellant; John McEnery & W. B. Sommerville, Esq., attorneys for defendant & appellee; J. C. Egan, Esq., attorney general for the State of La.; Henry Denis, Esq., att'y for respondents.

Transcript of appeal returnable to the honorable the supreme court of the State of Louisiana on the 3d Monday of February, 1884.

1 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

Petition. Filed January 23rd, 1884.

G. A. LANAUX.
vs.
RECORDER OF MORTGAGES. } No. 10449.

Division "B."

To the honorable the civil district court for Orleans parish:

The petition of George Alfred Lanaux, a resident of Orleans parish, respectfully represents:

That by act of Chas. T. Soniat, notary, dated January 30th, 1879, he purchased of the succession of widow G. M. Plicque three lots in this city, in the square bounded by Elysian Fields, Frenchman, Royal, and Chartres —, designated by the Nos. 1, 4, & 5, on a plan of A. D'Hémécourt, dated July 22d, 1840. Lot one forms the corner of Elysian Fields and Royal streets, and measures 30′ front on Elysian Fields street by 95′ 10″ 5‴ deep and front on Royal street; lot

2 No. 4 measures 30′ front on Elysian Fields street by 127′ 2″ 5‴ deep; lot No. 5 measures 32′ front on Royal street by a depth of 97′ 10″ 5‴; together with fifteen shares of stock, of $500 each, of the Consolidated Association of the Planters of Louisiana, as appears by said act, annexed as part hereof.

That said shares had originally been subscribed for and said property mortgaged in favor of the Consolidated Association by F. B.

Leban, by act of A. Ducatel, notary, dated June 6th, 1843; the reversion thereof assumed by said widow Plicque, by act of A. Ducatel, dated May, 1849, and lastly assumed by petitioner, in his act of purchase first above mentioned.

That by act No. 100 of 1847, page 76, and a resolution of the liquidators of said association, a contribution of $102 per share had been levied upon the stockholders as a "fund sufficient to meet faithfully and regularly the obligations of the State" issued for account of said bank; that said contribution has been paid by petitioner's authors; that said payment has discharged the obligations of the stockholders for their subscription and mortgage, and that the supreme court of this State, in the case of said Association *vs.* Lord,
3 No. 8589 of its docket and No. 2662 of the docket of the civil district court for this parish, reported in 35 A, 425, has finally decided that it does so discharge them.

That petitioner, in common with all the other stockholders, is obstructed and impeded in the rights of ownership of his said property, and is prevented from selling or mortgaging the same, which is practically taken out of commerce by reason of the inscription standing against the same of the mortgage in favor of said association for a sum exceeding its value; that by reason of the law and of the judgment of the supreme court aforementioned said inscriptions of mortgage have no right to remain any longer an incumbrancé upon his property, and that petitioner is entitled and desires to have the same cancelled and erased, which the recorder of mortgages refuses to do, notwithstanding amicable demand; that the slowness of ordinary judicial proceedings affords no adequate relief and would be tantamount to a denial of justice to petitioners, by reason whereof he is entitled to a mandamus in the premises.

That petitioner's property freed from the stock mortgage is worth more than a thousand dollars.

4 That Henry Denis, Leon Godschaux, E. J. Forstall's Sons, residents of Orleans parish, are the holders of the bonds issued by the State in aid of said association, to the best of petitioner's knowledge. Wherefore petitioner prays that a mandamus issue herein commanding Eugene May, recorder of mortgages, to cancel and erase from the books of his office any and all inscriptions against his property herein above described in favor of the Consolidated Association of the Planters of Louisiana, and more especially those in books 55,258, 46,469, and 171,596, and that he be ordered to deliver to petitioner a certificate of mortgages free and clear of said inscriptions, or that he show cause to the contrary on such day as this honorable court may fix, and that the State of Louisiana, through J. C. Egan, Esq., attorney general, the Consolidated Association of the Planters of Louisiana, through its liquidators, and Henry Denis, Esq., Leon Godschaux, and E. J. Forstall's Sons be notified of these proceedings by service of a copy of this petition; and petitioner prays for general relief, &c.

(Signed) CHAS. F. CLAIBORNE, *Att'y.*

5 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

The State of Louisiana to Eugene May, recorder of mortgages for the parish of Orleans, Greeting:

No. 10449. Filed January 23d, '84.

GEO. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 10449.

You are hereby commanded, in the name of the State of Louisiana and of the civil district court of the parish of Orleans, to comply with the demand of the plaintiff herein as contained in the petition, a copy of which accompanies this writ and is made a part hereof, or show cause to the contrary, on Monday, the fourth day of February, 1844, at 11 o'clock a. m.

Witness the Honorables A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, and Henry L. Lazarus, judges to our said court, this 26th day of January, in the year of our Lord one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the United States.

("Signed") JAMES D. RANKIN,
D'y Clerk.

6 *Sheriff's Return.*

Received Jan'y 26th, 1884, and on the 29th day of January, 1884, I served a copy of the within writ of mandamus & accompanying petition personally on Eugene May, recorder of mortgages, defendant herein.

("Signed") I. E. SIRKFORT,
D'y Sh'ff.

Return same day.

And on the 29th day of January, 1884, I served a copy of the within petition on the State of Louisiana, defendant herein, through I. C. Egan, its attorney general, by leaving the same at his office, No. 19 Commercial alley, in the hands of W. B. Sommerville, his chief clerk, a person apparently over the age of 14 years, said I. E. Egan, attorney general, being absent from his office at time of said service.

Return same day.

("Signed") I. E. SIERKFORT,
D'y Sheriff.

And on the 29th day of January, 1884, I served a copy of the within petition on E. I. Forstalls & Sons, defendants herein, through Ernest L. Forstall, a member of said firm, in person.

Return same day.

("Signed") I. E. SIRKFORT,
D'y Sh'ff.

January 26th, 1884, I served a copy of the within petition
7 personally on Leon Godchaux, herein named.
Ret. same day.
("Signed") P. A. McINTYRE,
Dep'y Sheriff.

JANUARY 31ST, 1884.

I served a copy of the within petition on the Consolidated Association of the planters of Louisiana unto Thomas I. Burke, receiver, in person.
Ret. same day.
("Signed") A. McCONNELL,
Dep'y Sheriff.

A true copy from the original on file in this office.
Clerk's office, New Orleans, March 5th, 1884.
[SEAL.] E. A. LUMINAIS,
D'y Clerk.

Affidavit.

George Alfred Lanaux, being sworn, says that all the facts and allegations contained in the foregoing petition are true and correct.
(Signed) G. A. LANAUX.

Sworn to and subscribed this 23rd day of January, 1884, before me—
(Signed) CHAS. T. SONIAT,
Not. Pub.

8 *Order.*

Let an alternative writ of mandamus issue, as herein prayed for and according to law, returnable on Monday, the 4th day of February, 1884, at 11 o'clock a. m.
New Orleans, January 23rd, 1884.
(Signed) W. T. HOUSTON, *Judge.*

Act of Sale of Property by Succession of Henrietta Louise Lanoix, W[illegible]w Girard Marin Plicque, to George Alfred Lanaux Annexed to Petition. Filed Jan'y 23rd, 1884.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Be it known that on this thirtieth day of the month of January, in the year of our Lord one thousand eight hundred and seventy-nine, 1879, and of the Independence of the United States of America the one hundred and third, before me, Charles Theodore Soniat, a notary public, duly commissioned and qualified for the parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally came and ap-
9 peared Francis Edgar Le Beau, a resident of this city herein acting as the duly qualified testamentary executor of the last

will and testament of Henrietta Louise Lanoix, widow Giraud Marin Plicque, who declared that by virtue of and in obedience to an order rendered on the twenty-ninth day of December, 1879, by the Honorable A. L. Tissot, judge of the second district court in and for the parish of Orleans, in the matter of the succession of Henriette Louise Lanoix, widow G. M. Plicque, No. 40513 of the docket of syid court, ordering the sale of the hereafter described real estate.

And that after due and legal advertisements published in the New Orleans Picayune, a journal for the parish of Orleans, on the 11th, 19th, and 26th December, 1878, and on the 3rd and 11th January, 1879, the hereafter described property was offered for sale at public auction on the eleventh day of the month of January, 1879, at the hour of 12 o'clock m., at the Merchants' and Auctioneers' Exchange, on Royal street, by S. Guinault, a duly licensed and commissioned auctioneer in and for the parish of Orleans, and was adjudicated to
G. A. Lanaux, a resident of this city, he being the highest
10 and last bidder thereon, for the price and sum of one hundred dollars ($100.00) cash, as the whole will more fully appear by reference to the *procès-verbal* of adjudication of said auctioneer, annexed to an act of sale to H. W. Koch, passed before me, notary, on the 23rd January, 1879:

Now, therefore, in furtherance and execution of said adjudication, the said François Edgar Le Beau, testamentary executor as aforesaid, does by these presents grant, bargain, sell, transfer, assign, convey, and set over, with all legal warranties and with substitution and subrogation to all rights and actions in warranty against all preceding vendors, owners, or possessors, unto George Alfred Lanaux, a resident of this city, here present, acknowledging possession and accepting for himself, heirs, and assigns forever the following-described property, to wit:

Three certain lots of ground situated in the third district of this city, in the square bounded by Elysian Fields, Royal (late Casacalvo), Frenchman, [and] Chartres (late Moreau) streets, designated by the Nos. 1, 4, & 5, as per plan of A. D'Hémécourt, dated 22 July, 1840;
lot No. "one" forms the corner of Elysian Fields and Royal
11 street, and measures thirty feet (30 ft.) front on Elysian Fields by ninety-five feet ten inches and five lines (96′ 10″ 5‴) in depth, and front on Royal street, together with the buildings and improvements thereon; lot No. "four" measures thirty feet front on Elysian Fields by one hundred and twenty-seven feet two inches and five lines (127′ 2″ 5‴) in depth; lot No. 5 measures thirty-two feet front (32) on Royal street by a depth of ninety-seven feet ten inches and five lines (97′ 10″ 5‴), together with fifteen (15) shares of stock of five hundred dollars each ($7,500.00). Being the same property which was acquired by Widow Plicque from F. B. Le Beau by act executed before A. Ducatel, notary, dated July 20th, 1849. To have and to hold the said real estate unto the said purchaser, his heirs and assigns, to their only proper use and behoof forever.

This sale made and accepted for and in consideration of the price and sum of one hundred dollars ($100.00), which sum the said George Alfred Lanaux has paid unto the said Francois Edgar Le

Beau, executor, in the manner following, to wit: According to the terms of adjudication, cash in United States currency, for which the vendor grants acquittance and discharge.

12 By reference to the certificate of non-alienation from the register of conveyances for the parish of Orleans, dated the 23rd day of the month of January, 1879, annexed for reference to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879, it does not appear that the real estate hereinabove described and sold has been alienated by Henriette Louise Lanoix, Widow Giraud Marie Plicque.

According to the certificate of mortgage from the recorder of mortgages for the parish of Orleans, dated the 29th day of the month of January, 1879, annexed for reference to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879, it appears that there are no other mortgages recorded against the above-described real estate and standing in the names of Henriette Louise Lanoix, widow Giraud Marie Plicque, George Plicque, Leon William Plicque, and Pierre Lanoix Plicque than the following, to wit:

1st. The reversion she took per act passed before Amedée Ducatel, notary, up to the amount of $7,500.00, interest and costs, amount of 15 shares of the Planters' Consolidated Association of Louisiana (B 55, fo. 258), recorded May 21st, 1849, of the mortgage

13 granted by Francois Barthelemy Le Bean and his wife in favor of the Planters' Consolidated Association of Louisiana, per act before Amedée Ducatel, notary, dated June 6th, 1843, to secure the sum of $7,500.00, interest and costs, the amout of 15 shares of the capital stock of said association. B'k 46, p. 469, rec'd June 10, '43.

The said George Alfred Lanaux, purchaser, does hereby assume the liabilities of the deceased as a stockholder of the Planters' Consolidated Association of Louisiana. The parties hereto have exhibited to me, notary, the city tax receipts of 1871, payable in 1872, of 1873, 1874, 1875, 1876, 1877, and 1878, and the State tax receipts for 1871, 1872, 1873, 1874, 1875, 1876, and 1877.

The purchaser assumes payment of the city taxes of 1879 and of the taxes for 1878, both due and exigible in 1879, over and above the price of adjudication.

And to these presents have intervened:

1st. Pierre Crabités of the firm of A. Rochereau & Co., agent and attorney-in-fact of George Plicque, residing at Paris, France, heir and legatee of his father, Pierre L. Plicque, who himself was the heir and legatee of the late widow G. M. Plicque for ¾ths of

14 her estate, the power of attorney under which the said P. Crabites acts was executed before Mr. Bourin, notary, and his colleague at Paris, France, on the 20th September, 1878, duly legalized, and being annexed to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879.

2d. Mr. Alexis Robert, agent and attorney-in-fact of Leon William Plicque, residing at Bordeaux, France, heir by representation of his father, the late Charles Ursin Plicque, of the said widow, G. M.

Plicque, for one fourth (¼) of her estate the power of attorney of said A. Robert, executor, before A. Briol and his colleague, notaries, at Bordeaux, and legalized by the United States consul, being annexed to an act of the 23rd Jan'y, 1879, before me, notary; and the said P. Crabites and A. Robert declare that they fully ratify and approve the sale herein made to the said George Alfred Lanaux.

Thus done and passed, at my office in this city, the day, month, and year first above written, in the presence of Messieurs Gabriel Fernandez and George L. de Armas, competent witnesses, residing in this city, who have hereunto signed their names with appearers, and me, notary, after reading the whole.

(Original signed) F. EDGAR LEBEAU,
Testamentary Ex.

15 A. ROBERT.
P. CRABITES.
G. A. LANAUX.
GABRIEL FERNANDEZ.
GEO. L. DE ARMAS.
CHARLES T. SONIAT,
Not Pub.

I, the undersigned notary, do hereby certify that the foregoing is a true copy of the original act of record in my office.

In faith whereof I have hereunto signed my name and affixed my official seal this 4th day of the month of February, 1879.

[SEAL.] CHAS. T. SONIAT,
Not. Pub.

Recorded in mortgage office in B. 171, fo. 596, on 30th Jan'y, 1879.

Registered in conveyance office in B. 109, fo. 176, on 30th Jan'y, 1879.

Exception of State of Louisiana. Filed Feb'y 4th, 1884.

Civil Dist. Court, Division "B."

THE STATE OF LA., on rel. Geo. A. Lanaux,
vs.
THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LA. *et als.* } No. 10449.

Now into court comes J. C. Egan, attorney general of the State of Louisiana, on whom a notice of this proceeding has been served, as prayed for by the relator, and who now appears
16 solely for the purpose of this exception, and on behalf of the State of Louisiana excepts peremptorily to this proceeding, and for grounds of exception show-:

That by the statutes of the State of Louisiana, under which the acts of mortgage described in relator's petition were executed, and which are therein mentioned, and other statutes, the said mortgages were intended to be and are operative in favor of the said Consolidated Association of the Planters of Louisiana, of the State of Louisiana, and of all holders of the bonds and obligations of said State and said

Beau, executor, in the manner following, to wit: According to the terms of adjudication, cash in United States currency, for which the vendor grants acquittance and discharge.

12 By reference to the certificate of non-alienation from the register of conveyances for the parish of Orleans, dated the 23rd day of the month of January, 1879, annexed for reference to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879, it does not appear that the real estate hereinabove described and sold has been alienated by Henriette Louise Lanoix, Widow Giraud Marie Plicque.

According to the certificate of mortgage from the recorder of mortgages for the parish of Orleans, dated the 29th day of the month of January, 1879, annexed for reference to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879, it appears that there are no other mortgages recorded against the above-described real estate and standing in the names of Henriette Louise Lanoix, widow Giraud Marie Plicque, George Plicque, Leon William Plicque, and Pierre Lanoix Plicque than the following, to wit:

1st. The reversion she took per act passed before Amedée Ducatel, notary, up to the amount of $7,500.00, interest and costs, amount of 15 shares of the Planters' Consolidated Association of Louisiana (B 55, fo. 258), recorded May 21st, 1849, of the mortgage

13 granted by Francois Barthelemy Le Bean and his wife in favor of the Planters' Consolidated Association of Louisiana, per act before Amedée Ducatel, notary, dated June 6th, 1843, to secure the sum of $7,500.00, interest and costs, the amout of 15 shares of the capital stock of said association. B'k 46, p. 469, rec'd June 10, '43.

The said George Alfred Lanaux, purchaser, does hereby assume the liabilities of the deceased as a stockholder of the Planters' Consolidated Association of Louisiana. The parties hereto have exhibited to me, notary, the city tax receipts of 1871, payable in 1872, of 1873, 1874, 1875, 1876, 1877, and 1878, and the State tax receipts for 1871, 1872, 1873, 1874, 1875, 1876, and 1877.

The purchaser assumes payment of the city taxes of 1879 and of the taxes for 1878, both due and exigible in 1879, over and above the price of adjudication.

And to these presents have intervened:

1st. Pierre Crabités of the firm of A. Rochereau & Co., agent and attorney-in-fact of George Plicque, residing at Paris, France, heir and legatee of his father, Pierre L. Plicque, who himself was the heir and legatee of the late widow G. M. Plicque for ⅘ths of

14 her estate, the power of attorney under which the said P. Crabites acts was executed before Mr. Bourin, notary, and his colleague at Paris, France, on the 20th September, 1878, duly legalized, and being annexed to an act of sale to H. W. Koch, executed before the undersigned notary on the 23d January, 1879.

2d. Mr. Alexis Robert, agent and attorney-in-fact of Leon William Plicque, residing at Bordeaux, France, heir by representation of his father, the late Charles Ursin Plicque, of the said widow, G. M.

Plicque, for one fourth (¼) of her estate the power of attorney of said A. Robert, executor, before A. Briol and his colleague, notaries, at Bordeaux, and legalized by the United States consul, being annexed to an act of the 23rd Jan'y, 1879, before me, notary; and the said P. Crabites and A. Robert declare that they fully ratify and approve the sale herein made to the said George Alfred Lanaux.

Thus done and passed, at my office in this city, the day, month, and year first above written, in the presence of Messieurs Gabriel Fernandez and George L. de Armas, competent witnesses, residing in this city, who have hereunto signed their names with appearers, and me, notary, after reading the whole.

(Original signed) F. EDGAR LEBEAU,
Testamentary Ex.

15 A. ROBERT.
P. CRABITES.
G. A. LANAUX.
GABRIEL FERNANDEZ.
GEO. L. DE ARMAS.
CHARLES T. SONIAT,
Not Pub.

I, the undersigned notary, do hereby certify that the foregoing is a true copy of the original act of record in my office.

In faith whereof I have hereunto signed my name and affixed my official seal this 4th day of the month of February, 1879.

[SEAL.] CHAS. T. SONIAT,
Not. Pub.

Recorded in mortgage office in B. 171, fo. 596, on 30th Jan'y, 1879.

Registered in conveyance office in B. 109, fo. 176, on 30th Jan'y, 1879.

Exception of State of Louisiana. Filed Feb'y 4th, 1884.

Civil Dist. Court, Division "B."

THE STATE OF LA., on rel. Geo. A. Lanaux,
vs.
THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LA. *et als.* } No. 10449.

Now into court comes J. C. Egan, attorney general of the State of Louisiana, on whom a notice of this proceeding has been served, as prayed for by the relator, and who now appears
16 solely for the purpose of this exception, and on behalf of the State of Louisiana excepts peremptorily to this proceeding, and for grounds of exception show-:

That by the statutes of the State of Louisiana, under which the acts of mortgage described in relator's petition were executed, and which are therein mentioned, and other statutes, the said mortgages were intended to be and are operative in favor of the said Consolidated Association of the Planters of Louisiana, of the State of Louisiana, and of all holders of the bonds and obligations of said State and said

association, issued with the terms of said statutes or of any of them, and that the question whether the said mortgages are valid and subsisting mortgages in favor of said association of the State and of the bondholders, as they are claimed by them to be, or are not, as is alleged by the relator herein, is a question which cannot be tried and determined in this form of proceeding in a suit by way of mandamus by the relator against the recorder of mortgages, who is without interest or capacity to stand in judgment as to said question, which can only be tried and determined in a plenary suit
17 *via ordinaria*, to which all the beneficiaries of said mortgages shall be made parties by service upon them of citation in due form of law.

And this exceptor says that to any proceeding for the cancellation and erasure of said mortgages the State of Louisiana, by reason of its direct interest therein as aforesaid, is a necessary and indispensable party, and that it cannot, without its consent, be made a party to any suit in any court, and that it declines to be made or to become a party to this proceeding for any purpose other than the purpose of this exception.

Wherefore the State of Louisiana prays that this its exception be maintained and that this proceeding be dismissed at relator's cost.

New Orleans, Feb'y 4th, '84.

(Signed) J. C. EGAN, *Att'y Gen'l.*
" W. B. SOMMERVILLE.

Return of Recorder of Mortgages to Alternative Writ of Mandamus. Filed February 4th, 1884.

Civil Dist. Court, Div. "B."

THE STATE OF LOUISIANA, *ex rel.* GEO. A. LANAUX,
vs.
THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LA., *et als.* } No. 10449.

18 Now comes Eugene R. May, recorder of mortgages for the parish of Orleans, and for return to the alternative writ of mandamus herein addressed to him says that he cannot be required to cancel the mortgages described in relator's petition and standing upon the books of his office in favor of the Consolidated Association of Planters of Louisiana, and which are claimed, as respondent is informed, to be valid and existing mortgages in favor of the said Consolidated Association and for the State of Louisiana, and of the holders of a large number of bonds issued by said State and by said corporation upon the faith of the said mortgages as security in this form of proceeding by way of mandamus against him in his official capacity, nor in any other form of proceeding, except after it shall have been judicially determined that said mortgages are not valid and existing securities, and thus relator is entitled to have the same erased in proceedings *via ordinaria* by way of citation contradictorily had with the parties aforesaid claiming the benefit of said mortgages; that as to the question whether or not said mortgages are valid and

existing securities in favor of said parties, and whether or not the relator is entitled to have them cancelled and erased from the
19 books of respondent's office, respondent is without interest and without capacity to stand in judgment in this proceeding by way of mandamus or in any other proceeding.

Wherefore he prays that the prayer of relator's petition be refused, said alternative writ of mandamus be discharged, and that he be hence dismissed with costs, etc.

New Orleans, Feb'y 4th, '84.

(Signed) JOHN McENERY,
Att'y for Recorder of Mort.
W. B. SOMMERVILLE.

Answer of E. J. Forstall's Sons and Henry Denis. Filed February 4th, 1884.

Div. "B."

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 10449.

E. J. Forstall's Sons and Henry Denis, respondents to the petition of George A. Lanaux praying for a mandamus, respectfully represents:

That respondents deny all and singular the allegations of said petition; that the relator is not entitled to the writ of mandamus in the premises, and has a full and adequate remedy in the ordinary proceedings of the law.

That this honorable court has no jurisdiction of the demand
20 of the relator, because receivers have been appointed to the Consolidated Association of Planters of Louisiana by the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and that court only can entertain jurisdiction of the matter set up by the relator.

Wherefore respondents pray that the petition of the relator be rejected and dismissed with costs.

(Signed) HENRY DENIS,
Att'y for Rep'ts.

Testimony. Filed Feb'y 4th, 1884.

Div. "B."

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 10449.

Testimony for plaintiff taken February 4th, 1884.

Appearances.

For plaintiff: Chas. Claiborne, Esq.

For defendants: H. B. Kelly, Esq., Henry Denis, Esq., and W. B. Sommerville, Esq.

Counsel for plaintiff offers and introduces in evidence the act of sale from the succession of Widow Plicque to George Alfred Lanaux.

JOHN CALHOUN, No. 766, St. Charles street, witness for plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. CLAIBORNE:

Q. What is your position in Consolidated Association of Planters?

21 A. Receiver.

Q. Under what appointment?

A. Under appointment of the United States circuit court.

Q. How long since have you acted as such?

A. Since the 29th of December, 1883.

Q. Before that, what was your position?

A. Cashier.

By the COURT:

Q. Cashier of the Planters' Association?

A. Yes, sir.

By Mr. CLAIBORNE:

Q. Do you know, Mr. Calhoun, whether on this property mentioned in this petition there is anything due to the bank?

A. There is one installment due.

Q. One installment due under what act?

A. Under act 100, of 1847.

Q. All the others have been paid?

A. Yes, sir; according to the book one installment of ninety ($90.00) dollars has never been paid that was due in 1862.

Q. It was due in 1862?

A. Yes, sir.

By the COURT:

[Q.] Ninety ($90.00) dollars on each one of those shares?

A. No, sir; six ($6.00) dollars on each one of the fifteen shares.

Q. Six ($6.00) dollars on each one of the fifteen shares and interest for seventeen years?

A. Yes, sir.

By Mr. DENIS:

22 Q. What installment has not been paid, Mr. Calhoun?

A. That of 1862 was not paid; six ($6.00) dollars a share on fifteen shares.

Cross-examination by Mr. KELLY:

Q. Mr. Calhoun, can you procure a copy of the act, the notarial act, under which notes for those various installments were given upon this property?

A. There was no notarial act, sir.

Q. Didn't every party accepting the benefit of the act of 1847—was not every party required to execute a notarial act?

A. No, sir.

Q. Didn't the board of directors pass a resolution to that effect?

A. A resolution was passed to levy this amount of one hundred and two ($102.00) dollars.

Q. Didn't the board of directors pass a resolution requiring every party wishing to avail themselves of the extention in act of 1847 to accept by notarial act and execute certain notes for the installments?

A. No, sir; they executed no notes for the installments.

Q. You showed me a copy of the notarial act the other day?

A. There never was any obligation entered into by the stockholders, and no notes whatever issued for these installments. There was simply a levy made by the board of directors under this
23 act of 1847; the board of directors made this levy in the year 1847.

Q. What I was enquiring about, Mr. Calhoun, was this levy of six ($6.00) dollars per share, payable in a term of eighteen years, at different intervals, whether for those installments there was not required, by a resolution of the board of directors, to be a notarial act executed and obligations for those installments given?

A. No, sir; not that I am aware of. A resolution was passed simply to levy this amount; the first levy was in 1849 and the last one in 1865, and they went on to collect them annually in June of each year, and to collect from all who were willing to pay.

It is admitted that the value of the bonds of the State transferred to and endorsed by the Consolidated Association of Planters of Louisiana, held by A. J. Forstall & Sons, are worth more than one thousand ($1,000.00) dollars, and the same admission is made as to Henry Denis.

Judgment

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 10449. Div. "B."

The exceptions of the State of Louisiana *et al.*, filed herein this day, were taken up for trial.

Present: Counsel for all parties in interest.

24 When after hearin- pleadings, evidence, and counsel, for the reason orally assigned by the court, it is ordered, adjudged, and decreed that said exceptions be maintained, and accordingly that the mandamus prayed for herein be denied and refused, and that this proceeding be dismissed at relator's cost.

Judgment rendered Feb'y 4th, 1884.

Judgment signed Feb'y 8th, 1884.

(Signed) W. T. HOUSTON, *Judge.*

Motion of Appeal. Extract from the Minutes of Febr'y 11th, 1884.

Civil District Court. Div. "B."

Present: Hon. W. T. Houston, judge.

G. A. LANAUX.
vs.
RECORDER OF MORTGAGES. } No. 10449.

On motion of Chas. F. Claiborne, of counsel for G. A. Lanaux, and on suggesting to the court that he is informed and believes that there is error to his prejudice in the judgment rendered herein on February 4th, 1884, and signed February 8th, 1884, and that he desires to appeal therefrom—

25 It is ordered that an appeal be granted the said G. A. Lanaux from said judgment, returnable to the supreme court of this State on the third Monday of February, 1884, on his giving surety in the sum of one hundred & fifty dollars conditioned as the law requires.

Bond of Appeal. Filed February 12th, 1884.

Know all men by these presents that we, George Alfred Lanaux, as principal, and Frank E. Bernard, of the city of New Orleans, as surety, are held and firmly bound unto James T. Clark, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of one hundred and fifty dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans on this twelfth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

26 Whereas the above-bounden George Alfred Lanaux this day filed a motion & order of appeal from a final judgment rendered against him in the suit of G. A. Lanaux *vs.* Recorder of Mortgages, No. 10449 of the civil district court for the parish of Orleans, on the fourth day of February, 1884, and signed on the eight-day of February, 1884:

Now, the condition of the above obligation is such that the above-bound George Alfred Lanaux shall prosecute his appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the said surety, Frank E. Bernard, shall be liable in his place.

(Signed) G. A. LANAUX. [SEAL.]
" F. E. BERNARD. [SEAL.]

27 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, James T. Clark, clerk of the civil district court for the parish of

Orleans, do hereby certify that the foregoing twenty-two pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause wherein G. A. Lanaux is plaintiff and the Recorder of Mortgages is defendant, instituted in this court and now in the records thereof under the No. 10449.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four and in the one hundred and eighth year of the Independence of the United States of America.

[SEAL.] JAMES T. CLARK, *Clerk.*

28 *Order. Summary Docket. Filed February 18th,* 1884.

Supreme Court of Louisiana.

G. A. LANAUX *vs.* RECORDER OF MORTGAGES. } No. 10449. C. D. C. No. 9164.

CLERK'S OFFICE.

The clerk will please place this case upon the summary docket as a mandamus proceeding.

Feb. 18, '84.

CHAS. F. CLAIBORNE,
Att'y for Pl'ff.

Supreme Court of Louisiana.

Order to Submit. Filed Mar. 25th, 1884. George W. Dupre, Clerk.

G. A. LANAUX *vs.* RECORDER OF MORTGAGES *et al.* } No. 9164.

The clerk of the supreme court will please submit the above-numbered case on behalf of the State of La. & Recorder of Mortgages on briefs.

Very respectfully,

J. C. EGAN,
Att'y General,
Per W. B. SOMMERVILLE.
JOHN McENAN,
Att'y for Recorder of Mortgages.

New Orleans, March 25, 1884.

29 *Order to Submit. Filed March* 25, 1885.

G. A. LANAUX *vs.* RECORDER OF MORTGAGES. } No. 9164.

The clerk will please submit in case of my absence.

C. F. CLAIBORNE,
Att'y for Lanaux.

Called & Appearance.

Extract from the Minutes.

TUESDAY, *March 25th*, 1884.

The court was duly opened. Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 9164.

This case was called for trial, and, having heard argument from Charles F. Claiborne, Esq., of counsel for plaintiffs and appellant, the court took said case under advisement upon the briefs now on file for parties in interest.

30 *Final Decree & Opinion.*

Extract from the Minutes.

MONDAY, *April 7th*, 1884.

The court was duly opened pursuant to adjournment. Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

Judgment Affirmed.

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 9164.

(The C. J. concurs in the decree.)

Appeal from the Civil District Court, Parish of Orleans.

G. A. LANAUX *vs.* RECORDER OF MORTGAGES.

APRIL 7TH, 1884.

Mr. Justice Manning:

The plaintiff has taken this proceeding to compel the erasure of the mortgage upon three lots of ground in this city in favor of the Consolidated Association of Planters. That association is made a party and three holders of bonds issued by the State in its favor also, and the State is attempted to be brought in through service on the attorney general. The allegations are that the assessment of $102 per share levied under the act of 1847 has been paid by the petitioner's authors, and that this court has held
31 in Consol. Association *vs.* Lord, 35 An., 425, that such payment discharged the obligations of the stockholders, and, therefore, the plaintiff, as one of them, is entitled to have the mortgage upon his property erased; that the ordinary judicial proceeding affords no adequate relief, and a mandamus is therefore prayed

to effect an immediate removal of this incumbrance, which, so long as it remains, puts this property practically out of commerce.

All the defendants excepted that the binding force of the alleged mortgage cannot be determined in a proceeding by mandamus against the receiver, but only in a plenary suit whereto all the beneficiaries of that mortgage are parties, and that the plaintiff must first procure a judicial decree of the invalidity and non-existence of the mortgage upon his land before he can require the erasure of the inscription thereof.

This last proposition is precisely the one that the plaintiff disputes. He has proceeded on the assumption that the principal of the Lord case applies to every one *in consimili casa*, and he has invoked the remedy of mandamus not to examine and have determined the invalidity of the mortgage, but to compel the erasure of a mortgage, the invalidity of which, he claims, has been already determined, and he enforces his right *arguendo* to proceed
32 thus by the inquiry if, after it had been decided that the city taxes were prescribed in ten years (Suc. Zacharie, 30 An., 1260), and that judgments for drainage tax were null (Suc'n Buvin, 33 An., 63), other parties had to wait until sued in ordinary actions, or had to institute ordinary actions themselves in order to have cancelled the inscriptions for such taxes or drainage.

The vice of the argument is in the postulate that the invalidity of the mortgage upon his lots has been determined. If he be in the same condition as was Lord the same principle would be effectual for his release, but we cannot take for granted that such is the fact. We cannot take his allegations as an absolute verity. It may be that the legal assessments have not been paid by him or his authors and that prescription does not bar the collection of them, or that there are other features in his case which distinguish if from Lord's.

The test to the right of relief by mandamus is the possession of a clear, legal right and the want of any other adequate remedy to enforce it. (High Ex. Legal Rem., sec. 10.)

His clear, legal right rests upon his allegations alone, and his employment of this remedy has for its basis the two assumptions that such legal right is clear and undisputable, and no other adequate means for its enforcement is procurable.

A legal right cannot be indisputable until it is established
33 by legal proof, and an adequate remedy to enforce it cannot be said to be wanting when a direct suit contradictorily with all the parties concerned can be employed.

The writ of mandamus is not designed to supercede the ordinary forms of judicial proceedings, but to supplement them.

Judgment affirmed.

Bermudez, C. J., concurs in the decree.

Petition for Rehearing. Filed April 9, 1884.

To the honorable the supreme court of the State of Louisiana:

The petition of George A. Lanaux respectfully represents—

That he verily believes that the opinion and decree rendered herein are contrary to law and evidence.

Contrary to the evidence in this:

That the decision herein purports to rest upon the absence of proof that all the instalments upon Lanaux's share had been paid or were prescribed, and that consequently he was not *in consimili casu* with Lord's case, while the evidence of Mr. Calhoun, one of the liquidators of the bank, on page 17 of the transcript, shows that all the instalments under the act of 1847 have been paid with the exception of one, and in 1862, which is long since prescribed,
34 two facts not disputed, thus placing Lanaux *in ipsis senie consimili casu* with Lord.

2d. Contrary to law when the court says that the test of the right to relief by mandamus is the want of any other adequate legal remedy to enforce a legal right.

Wherefore he respectfully prays for a rehearing and for general relief, &c.

CHAS. F. CLAIBORNE, *Att'y.*

Rehearing Granted.

Extracts from the minutes.

MONDAY, *May 19th*, 1884.

The court was duly opened pursuant to adjournment.

Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

LANAUX
vs.
RECORDER OF MORTGAGES. } No. 9164.

It is ordered that the rehearing applied for in this case be granted.

Called & Appearance.

Extract from the minutes.

FRIDAY, *November 7th*, 1884.

The court was duly opened pursuant to an adjournment.

Present: Their honors, Edward Bermudez, chief justice,
35 and Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justice-.

G. H. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 9164.

The case was duly called and submitted by consent, five days being allowed by the court to file briefs. (Associate Justice Fenner recused.)

Final Decree and Opinion on Rehearing. December 1st, 1884.

Mr. Justice MANNING:

The object of a mandamus in our practice is to present a denial

of justice or to avert the consequence of a defective remedy. It must be issued when there is no ordinary legal relief and justice requires that a mode of redressing the wrong shall be found. It may be issued even when there are other means of relief, if the ordinary legal forms will produce such delay that the public good will suffer and the administration of justice be hindered. Code Prac., Arts, 830–1.

This writ may be said to be the ordinary relief for a party wishing to obtain the erasure of mortgages upon the property. This court said, in Savage *vs.* Holmes, 15 Ann., 334, that the daily practice was to use it for a building contract where the builder had abandoned his partially finished work. A similar use of the writ was justified in State *ex rel.* DeBheux *vs.* Recorder, 25 An., 61.

36 If this has become the ordinary legal form for this particular purpose, the objection that it cannot be employed when relief can be had by the ordinary means falls, since judicial sanction of duty practice has converted what was a means of averting the consequence of a defective remedy into a perfect and ordinary remedy of itself.

If this be not so, what is the ordinary relief for one whose property is apparently incumbered by mortgages? Must he wait until he who holds the apparent mortgages sues to enforce them and then plead prescription or payment on other ground of non-existence or extinction? In that case there should be such delay as to hinder the administration of justice, and thus he would come within the provision for the permissive use of the writ even where there are other means of relief.

Now, in this case, the proof is that all the instalments have been paid except one, and that is only ninety dollars, and has been due since 1862. There is, therefore, nothing due and exigible, and we were incorrect in saying on the first hearing that the plaintiff did not appear to be *in consimili casu* with Lord. And as we then held that if he were in the same condition as was Lord the principle of that case would be effectual for his release, the ascertainment of that fact furnishes occasion for the application of the same remedy.

37 A condition precedent to the use of the writ for the purpose of compelling the erasure of mortgages is that all the parties in interest must be brought before the court Suc. Hearing Manning's Unrep. Cas. 33.

The attorney general excepted that the State cannot be made a party to any suit without her consent. If this were a suit against the State in any proper sense the objection would be good, but it is a proceeding to compel a ministerial officer to do what is alleged to be his manifest duty in a matter wherein it has been judicially declared the Sate has lost all interest where the proof is similar to that produced in this case. Besides, if the other branch of the exception be true, viz., that her right can be tested only in a plenary suit *via ordinaria*, the plaintiff would be powerless to bring such suit and the mortgage would remain on his property uncancelled, notwithstanding his right to its cancellation was apparent.

The point made that this court is without jurisdiction, because

receivers have been appointed for the Consolidated Association by the United States circuit court in untenable, when the objects of the proceeding is to erase from the mortgage book of the State an encumbrance created by the law, and which the circuit
38 court of the United States would have no authority to order.

We are thus constrained to take a view of this matter different to that we first expressed and must change our ruling thereon.

It is, therefore, ordered and adjudged that our former decree be set aside; that the judgment of the lower court is reversed, and that a mandamus issue as prayed for at the respondent's costs.

Fenner, J., recuses himself.

39 *Petition for Writ of Error. Filed March 14th*, 1885.

Supreme Court, State of Louisiana.

G. A. LANAUX
vs.
RECORDER OF MORTGAGES. } No. 9164.

To the honorable the judges of the supreme court of the State of Louisiana:

The petition of John Calhoun, sole receiver of the Consolidated Association of the Planters of Louisiana, by appointment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, his colleague, Thos. J. Burke, Esq., formerly co-receiver, having been relieved from said office since the commencement of these proceedings, as will appear from duly certified copies of the orders of said circuit court hereto annexed and made part hereof, and of Henry Denis, defendants in the above-entitled and numbered suit, respectfully shows that they are informed and believe that there is error to their prejudice in the final decree herein rendered on 1st December, 1884, against them, and that in this case there was drawn in question the validity of an authority ex-
40 ercised under the United States, and the decision was against said validity, and that in this case a title, right, privilege, and immunity was claimed under the Constitution and statutes of the United States and under authority exercised under the United States—namely, the exclusive jurisdiction of the circuit court of the United States for the fifth circuit and eastern district of Louisiana over the subject-matter of this suit, and the immunity of the receivers of said Consolidated Association of the Planters of Louisiana as officers of the United States and of said circuit court of the United States from the jurisdiction of the courts of the State of Louisiana and of this honorable court, and the decision of this honorable court was against said title, right, privilege, and immunity so claimed as aforesaid, and that said petitioners desire to take a writ of error from said decree to the Supreme Court of the United States, according to law.

And petitioners further show that Eugene May, late recorder of mortgages for the parish of Orleans, State of Louisiana; his successor in

office, John I. O'Brien, present recorder of mortgages for the parish of Orleans, State of Louisiana, *the State of Louisiana;* Leon Godchaux and Ernest L. Forstall and Caroline Berault, widow of Oscar J. Forstall, natural tutrix and *ex-officio* administratrix of the succession of her said husband, Oscar J. Forstall, composing the firm of E. J. Forstall's
41 Sons, are parties defendant in this cause and parties to the said final decree, and necessary parties to this writ of error, and petitioners have no means of definitely ascertaining whether said parties will join them in this petition for a writ of error or refuse to do so, except by notice and summons to that effect to appear before this honorable court to make their election.

Wherefore these petitioners pray that an order issue herein summoning said Eugene May, late recorder of mortgages for the parish of Orleans, State of Louisiana; his successor in office, John I. O'Brien, present recorder of mortgages for the Parish of Orleans, State of Louisiana; the State of Louisiana, through its attorney general, Leon Godchaux, and Ernest L. Forstall and Caroline Berault, widow of Oscar J. Forstall, natural tutrix and *ex-officio* administratrix of the succession of her said husband, Oscar J. Forstall, composing the firm of E. J. Forstall's Sons, to appear on a day to be fixed, then and there to declare or show cause whether they will or should join petitioners in the writ of error herein prayed, and, in default of their so joining or appearing, that a writ of error be granted to petitioners herein from said final decree herein, returnable to the Supreme Court of the United States at its next regular term, the sec-
42 ond Monday of October next, 1885, upon petitioners giving bond, with good and solvent security, in the sum of five hundred dollars, conditioned, as the law directs, that G. A. Lanaux, plaintiff herein, be notified hereof.

And petitioners pray for all general relief.

JOSEPH P. HORNER AND
F. W. BAKER,
Of Counsel for Petitioners.

JOHN CALHOUN, being duly sworn, deposes and says that all the allegations of the foregoing petition are true.

J. CALHOUN.

Sworn to and subscribed before me, this 6th day of March, 1885.

EDGAR GRIMA,
Not. Pub.

Order.

Let a writ of error be granted to the petitioners herein, returnable to the Supreme Court of the United States at its next regular term, the second Monday of October next, 1885, upon petitioners giving bond, with good and solvent security, in the sum of five hundred dollars, conditioned as the law directs; and let the codefendants of petitioners, as prayed for, be notified to appear on or before Saturday, the 21st day of March, 1885, to show cause, if any
43 they have, or declare whether they or any or each of them are desirous of joining petitioners on the writ of error herein

allowed from the decree herein rendered against them on 1st December, 1884.

Service of the within petition accepted, and we hereby declare that we will not join in the writ of error prayed for.

EUGENE MAY,
Ex-Recorder Mortgages, Parish Orleans.
JNO. J. O'BRIEN,
Recorder of Mortgages, Parish of Orleans.
M. J. CUNNINGHAM,
Attorney General.
E. J. FORSTALL'S SONS AND
MRS. O. J. FORSTALL, *Tutrix, &c.*
By their Attorney, HENRY DENIS.

Order.

The exceptions filed by Forstall's Sons and Denis to the jurisdiction of the district court were filed after the general issue had been pleaded. They do not appear to have been urged in the lower court, as no evidence was offered to show jurisdiction in the 5th circuit court, eastern dist. of La., and were not passed upon, as the judgment of the lower court dismissed the application on a question of proceeding. On appeal no allusion was made to them, and no action of the appellate court was asked on them.

The exceptors have taken a chance for a decision in their
44 favor on the merits. After getting one against them they cannot be allowed the relief now sought. 20 Wall., 414; Mays *vs.* Fritten.

The application for the writ is refused.

New Orleans, March 26th, 1885.

E. BERMUDEZ, *Chief Justice.*

Document A, Annexed to Petition.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. April Term, A. D. 1884.

NEW ORLEANS, MONDAY, *the 23d day of June*, 1884.

Court met pursuant to adjournment.

Present: The Honorable Don A. Pardee, circuit judge.

WILLIAM CRESSY
vs.
CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA. } No. 10432.

In this cause to the end, that the costs and expenses may be reduced as far as possible, and there being at this time no necessity for more than one receiver herein, it is ordered and decreed
45 that the orders and decrees herein and heretofore entered on 29th December, 1883, and 4th January, 1884, appointing

Thomas J. Burke and John Calhoun joint receivers herein, be now amended so far only as to relieve said Thomas J. Burke from all further duty and responsibility as receiver herein. It is further ordered and decreed that said John Calhoun be, and he is hereby, continued as sole receiver herein, with all the powers and duties as such receiver, as hereinbefore decreed.

It is further ordered that said receivers be allowed the further sum of six hundred dollars each on account for services as such receivers to this date.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 10th day of March, 1885.

[L. S.] E. R. HUNT, *Clerk.*

Document B.

United States Circuit Court, Eastern District of Louisiana. November Term, 1883.

Extract from the Minutes.

NEW ORLEANS, SATURDAY, *Dec. 29th*, 1883.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

46 WILLIAM CRESSEY
vs.
THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA. } No. 10432.

This cause came on to be heard upon the application of the complainant for an injunction and for the appointment of a receiver, and was submitted by counsel, whereupon, after due consideration, it is ordered by the court that the rule herein taken for the appointment of a receiver and for an injunction as prayed for in the bill be made absolute, and that accordingly a writ of injunction be issued herein enjoining and restraining the defendants, and each of them, from drawing any money deposited in any or any other institution which may be to the credit of the Consolidated Association of the Planters of Louisiana, and from selling, or causing to be sold or disposed of, any of the property or effects of such association, and from expending money from the cultivation of plantation, and from disbursing any money for any purpose whatever on account of said association; from employing accountants or clerks, and from
47 doing any act as president or directors or managers of said association, or for the administration of the same.

It is further ordered that John Calhoun, T. J. Burke, and Geo. W. Nott, Esquires, be appointed as receivers herein, and shall give bonds in the sum of five thousand dollars each for the faithful performance of the duties of their office, which amount may be here-

after increased, and that said receivers do forthwith take possession of all the property and assets of the said association and proceed to administer the same under the direction of the court, and collect all accounts due said association, and all parties having possession of assets, securities, books, papers, vouchers, or effects of said association be ordered to deliver up the same to said receivers, and that said receivers be vested with all the rights and powers of receivers in equity in this cause.

And it is further ordered that the bonds of said receivers be given before A. J. Brice, Esq., master in chancery, who is appointed special master for this case.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

New Orleans, March 10th, 1885.

[L. S.] E. R. HUNT, *Clerk.*

48 *Document C.*

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

Extract from the Minute-Book. November Term, 1883.

WILLIAM CRESSEY
vs.
THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA. } No. 10432.

NEW ORLEANS, FRIDAY, *January 4th*, 1884.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

And now, upon this 4th day of January, 1884, Thos. J. Burke and John Calhoun, heretofore appointed receivers herein, having filed herein their several bonds, with good and solvent sureties, in accordance with the decree heretofore entered herein on the 29th day of December, 1883, and the same having been approved by the master to whom it was referred:

In order, therefore, more effectually to carry out the aforesaid decree, it is now furthermore ordered and decreed by the court in this proceeding that said joint receivers, Thos. J. Burke and John Calhoun, be and they are in this proceeding, as they have
49 heretofore been, hereby invested with all the powers and authority and charged with all the duties in said decree mentioned, and with all the powers and duties of receivers in chancery, and under and in accordance with law and the rules and practice of equity and of this court, and they are hereby authorized, instructed, and directed, without delay, to enter upon the discharge of their duties as aforesaid, and to take immediate possession of all and singular the property, real and personal, equitable interest, things in action, rights and credits, franchises, and effects of the Consoli-

dated Association of the Planters of Louisiana now in process of liquidation.

Furthermore, it is hereby ordered and decreed that any person or persons pretending to represent the Consolidated Association of the Planters of Louisiana, and the president, directors, and managers of said association, defendants herein, and any party or parties claiming to have or to hold any portion of the property and effects of the aforesaid association, hereinafter referred to, be and appear before A. G. Brice, special master in this case, at such time and place
50 as he may designate, and execute and deliver to the said receivers an assignment, transfer, and conveyance, duly and legally assigning, transferring, and conveying to the joint receivers aforesaid all the aforesaid property, real or personal, equitable interests, things in action, and effects of every nature or kind whatsoever, to be by them administered upon and hereafter accounted for as joint receivers, reserving to them, the said receivers, the right hereafter to apply to the court for such other and further orders and directions as may be needed or required in the premises.

CLERK'S OFFICE.

A true copy from the original record in this office.
New Orleans, March 11th, 1885.
[L. S.] E. R. HUNT, *Clerk.*

51 *Document "A." Filed May 13th*, 1885. *George W. Dupré, Clerk.*

Supreme Court of Louisiana.

G. A. LANAUX *vs.* RECORDER OF MORTGAGES.

Leon Godchaux, one of the defendants herein, does not desire to take part in the writ of error applied for by John C. Calhoun, receiver, and Henry Denis.
New Orleans, May 7th, 1885.

T. GILMORE & SONS,
Att'ys for Gadchaux.

Supreme Court of Louisiana.

Writ of Error. Filed May 13, 1885.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision should be had in the said suit between George Alfred Lanaux,
52 plaintiff, and John Calhoun, receiver of the Consolidated Association of the Planters of Louisana, and Henry Denis and others, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United

States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said John Calhoun, receiver of the Consolidated Association of the Planters of Louisiana, and the said Henry Denis, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then, under your seal, distinctly and openly, you send the record
53 and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 12th day of May, in the year of our Lord one thousand eight huudred and eighty-five.

[SEAL.] E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
W. B. WOODS,
Justice U. S. Supreme Court.

Bond for Writ of Error. Filed May 13, 1885. *George W. Dupré, Clerk.*

Know all men by these presents that we, John Calhoun, sole receiver of the Consolidated Association of the Planters of Louisiana, and Henry Denis, as principal, and F. W. Baker, as
54 surety, are held and firmly bound unto George Alfred Lanaux in the full and just sum of five hundred dollars, to be paid to the said George Alfred Lanaux, his certain attorney; executors, administrators, or assigns, to which payment, well and truly to be made, we binds ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th (sixth) day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a session of the supreme court of the State of Louisiana at New Orleans, in a suit depending in said supreme court, wherein said George Alfred Lanaux is plaintiff and said Jno.

Calhoun, receiver, and Henry Denis *et als.*, defendants, judgment was rendered against the said John Calhoun, receiver, & Henry Denis *et als.*, defendants, and the said Jno. Calhoun, receiver, and said Henry Denis having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said George Alfred Lanaux, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

55 Now, the condition of the above obligation is such that if the said John Calhoun, receiver, and said Henry Denis shall prosecute their writ of effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. CALHOUN, [L. S.]
Receiver of the Consolidated Assoc'n of Planters of La.
HENRY DENIS. [L. S.]
FRANCIS W. BAKER. [L. S.]

Sealed and delivered in the presence of—
JOSEPH P. HORNER.

Approved May 12, 1885.
W. B. WOODS,
Justice Sup. Court U. S.

Francis W. Baker, surety on the within bond, being duly sworn, deposes and says that he resides in New Orleans, in the State of Louisiana, and that he is well worth the sum of five hundred dollars after the payment of all his debts and liabilities.

(Signed) FRANCIS W. BAKER.

Sworn to & subscribed before me, this 6th day of May, 1885.
(Signed) T. McC. HYMAN,
D'y Clerk.

56 *Citation. Marshal's Return. Filed May 13th*, 1885.

Supreme Court of Louisiana.

G. A. LANAUX
vs.
RECORDER OF MORTGAGES *et als.* } No. 9164.

THE UNITED STATES OF AMERICA:

The President of the United States to George Alfred Lanaux, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein John Calhoun, receiver of the Consolidated Association of the Planters of Louisiana, and Henry Denis are plaintiffs in error,

and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this — day of ——, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] (Signed) W. B. WOODS,
Justice U. S. Supreme Court.

Attest: E. R. HUNT,
Clerk U. S. Circuit [Court], Eastern Dist. of Louisiana.

57 UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

I, George W. Dupré, clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, do hereby certify that the foregoing fifty-six pages contain a full, true, and complete transcript of the proceedings had in civil district court for the parish of Orleans in a certain suit wherein G. A. Lanaux was plaintiff and the Recorder of Mortgages was defendant, and also of all the proceedings had in this supreme court on the appeal taken — said G. A. Lanaux, which appeal is now on the file thereof under No. 9164.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 13th day of May, A. D. 1885.

[Seal Supreme Court of the State of Louisiana.]

GEORGE W. DUPRE, *Clerk.*

58 UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that George W. Dupré is clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans; that the signature of George W. Dupré to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at this city of New Orleans, this 13th day of May, A. D. 1885.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
Chief Justice.

Endorsed on cover: Louisiana supreme court. No. 870. John Calhoun, receiver of the Consolidated Association of the Planters of Louisiana, and Henry Denis, plaintiffs in error, *vs.* George Alfred Lanaux. Filed June 26, 1885.

127-634.

Office Supreme Court U. S.
FILED
MAR 1 1886
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 870.

JOHN CALHOUN, RECEIVER, AND HENRY DENIS,
PLAINTIFFS IN ERROR,

versus

GEORGE ALFRED LANAUX.

IN ERROR TO SUPREME COURT OF THE STATE OF LOUISIANA.

ON MOTION TO DISMISS AND AFFIRM.

Brief for Plaintiffs in Error.

JOSEPH P. HORNOR,
FRANCIS W. BAKER,
of Counsel.

A. W. Hyatt, Print, 73 Camp St N. O—34,072

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Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this — day of ——, in the year of our Lord one thousand eight hundred and eighty-five.

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[Seal Supreme Court of the State of Louisiana.]

GEORGE W. DUPRE, *Clerk.*

58 UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of Louisiana.

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In testimony whereof I have hereunto set my hand and seal, at this city of New Orleans, this 13th day of May, A. D. 1885.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
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SUPREME COURT OF THE UNITED STATES.

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JOHN CALHOUN, RECEIVER, AND HENRY DENIS,
PLAINTIFFS IN ERROR,

versus

GEORGE ALFRED LANAUX.

IN ERROR TO SUPREME COURT OF THE STATE OF LOUISIANA.

ON MOTION TO DISMISS AND AFFIRM.

Brief for Plaintiffs in Error.

I.

This suit was instituted by the defendant in error, on 23d February, 1884, for a writ of mandamus to the Recorder of Mortgages ordering him to erase certain mortgages inscribed against the property of said defendant in error *in favor of* the Consolidated Association of the Planters of Louisiana.—Record, pp. 1 and 2.

That corporation was put into the hands of receivers (one of whom is the plaintiff in error) by decree of the United States Circuit Court for the Eastern District of Louisiana, on 29th December, 1883, nearly two months before the original institution of this suit.—Record, p. 21, *et seq.*

The defendant in error took very good care not to apprise the State Court in his petition of the fact that receivers had been appointed by the Federal Court, but simply asks that the association be notified through its *liquidator*, without naming him.—Record, p. 2, foot of page.

But the defendant in error well knew that receivers had been appointed by the Federal Court, because he caused notice to be served on one of its receivers, Record, p. 4, and said association was not notified in any other way.

II.

The order of the Federal Court confirming the appointment of the receivers, under date of January 4, 1884, long before the institution of this suit, commanded them "to take immediate possession of all and singular the property, real and personal, equitable interests, things in action, rights and credits, franchises and effects of the Consolidated Association of the Planters of Louisiana, now in process of liquidation.'"—Record, p. 22.

Consequently, the receivers of the Federal Court were in absolute possession of the "*thing*" in controversy in this suit, that "*thing*" being the *mortgage sought to be cancelled*, long before this suit was instituted.

This state of facts was brought to the notice of the State Court by the answer of Forstall's Sons and Henry Denis, the latter one of the plaintiffs in error here, in which it is expressly averred that the State courts had "no jurisdiction of the de-" mand of the relator, because receivers have been appointed to " the Consolidated Association of Planters of Louisiana by the " Circuit Court of the United States for the Fifth Circuit and " Eastern District of Louisiana, and that Court only can enter-" tain jurisdiction of the matter set up by relator."—Record, p. 9.

III.

Thus, a right, title, privilege and immunity was claimed under the Constitution and laws of the United States, and un-

der authority exercised under the United States; namely, the exclusive jurisdiction of the Circuit Court of the United States over the subject matter of this suit, and the immunity of the receivers of said Consolidated Association of the Planters of Louisiana, as officers of the United States and of said Circuit Court of the United States from the jurisdiction of the courts of the State of Louisiana.—See petition for writ of error, Record, p. 18.

And in its decision the Supreme Court of Louisiana directly passed upon this point, as follows: "The point made "that this Court is without jurisdiction, because receivers "have been appointed for the Consolidated Association by the "United States Circuit Court is untenable, when the object of "the proceeding is to erase from the mortgage book of the "State an encumbrance created by the law, and which the Cir- "cuit Court of the United States would have no authority to "order."—See Record, foot of p. 17 and top of p. 18.

Thus, the right, title, privilege and immunity under the laws of the United States appears to have been claimed, and the validity of an authority exercised under the United States was drawn in question, and the decision of the State Court was against that validity, and against the right, title, privilege and immunity so claimed, and, therefore, we have a perfect case entitling us to the writ of error to this Hon. Court under the provisions of Sec. 709 of the Revised Statutes of the United States.

"There seems to be no reason to doubt that the case comes within the provisions of the 25th Section of the Judiciary Act. (R. S. U. S, 709.) The defendant *claimed* the protection of "an authority exercised under the United States," and the decision was *against* the authority thus claimed; or, in other words, was against the validity of that authority, *as a protection to him in that action.* Whether the authority, which he thus set up was *valid*, to protect him *is a question for this Court* to decide finally, and is properly before us under the writ of error."—Buck vs. Colbath, 3 Wall. 340.

See also—

Clements vs. Berry, 11 Howard, 408.
Sharpe vs. Doyle, 102 U. S. Rep. 686.
Fiebelman vs. Packard, 109 U. S. Rep. 421.
Minnesota vs. Bachelder, 1 Wall. 109.
Ableman vs. Booth, 18 Howard, 514 to 524.

IV.

But our opponents insist that because the receivers did not themselves set up the plea to the jurisdiction of the Court, therefore, they cannot be heard here to urge it, and that the other plaintiff in error, Henry Denis, cannot avail himself of it, because he merely set up the title of the receivers to defeat the claim of relator (the defendant in error), and the case of Long vs. Converse, 91 U. S. Rep. 105, is relied upon.

That case decides that "this Court has no jurisdiction to review the decision of a State Court against a right and a title under a statute of the United States, unless such right and title be specially set up and claimed by the party for himself, and not for a third party under whom he does not claim;" but in the case at bar, Denis *does claim under* the receivers, for he is a creditor by the allegations of the petition, and, therefore, interested in having the property of the Association undisturbed in the hands of the receivers, and in having them and their matters exclusively under the jurisdiction of the Federal Court that appointed them. Therefore, Denis had an interest of his own to claim the immunity set up in his plea, and when the decision of the State Court was adverse to it, he had a right to his writ of error, and to have the point passed on here. As a creditor Denis wanted to collect his debt, and his debt was more than $1000 00 (Rec. p. 11), and by reason of the action of the Federal Court in appointing the receivers he could only collect his debt through them, and he had an interest, therefore, in endeavoring to hold the property of the Association, his debtor, in the hands

of the receivers, and to claim for them the immunity under the laws of the United States, to be sued only in the Court appointing them, which was a Federal Court. The receivers were officers appointed for the purpose of collecting assets to pay the debts of Denis and other creditors.

V.

But the receivers had no opportunity to set up the plea for themselves, for they have had no day in Court in this proceeding, as we shall now show.

In the first place, but one receiver was notified of these proceedings (Record, p. 4), and there were three appointed (p. 21), and two were confirmed (p. 22). Both were entitled to be notified. It is said on the other side that the one who was not notified, Calhoun, was a witness in the case, and therefore had notice, but that is a fallacy; by an examination of his testimony in the Record, it will be seen that not one word was uttered by either of the counsel, in their interrogatories to him, that would have informed him that this was a case in which he was the principal defendant; and it appears, also, that no counsel were present to represent the receivers.—See Record, pp. 9 to 11.

Another party to this suit, the State of Louisiana, filed a peremptory exception to the petition for a mandamus, by her Attorney-General, *appearing solely for the purpose of this exception*, on the grounds that the questions involved could not be tried and determined in this form of a proceeding for a mandamus, and because the State, without its consent, could not be made a party to any suit, and declines to become a party to this proceeding.—Rec. pp. 7, 8.

Now what is a "peremptory exception" under Louisiana law and practice? "Exceptions are means of defence used by the defendant to retard, prevent or defeat the demand brought against him."—La. Code of Practice, art. 330. "Peremptory exceptions are those which tend to the dismissal of the action."—La. Code of Practice, art. 343. "Peremptory exceptions *relating*

to forms are those which tend to have the cause dismissed, owing to some nullities in the proceedings. Such exceptions *must* be pleaded *in limine litis*—that is to say, at the beginning of the suit, and *before answering to the merits*. After the defendant has pleaded to the merits, such exceptions *shall not be heard;* all nullities are cured."—La. Code of Practice, art. 344.

The exceptions of the State of Louisiana came up for trial on the day fixed, and nothing else was tried, and the Court maintained the exceptions, and the mandamus prayed for was denied and refused, and this proceeding dismissed at relators' costs.—See judgment, Rec. p. 11.

So that the case was never reached on its merits in the Court of original jurisdiction, and consequently the receivers never had a day in that Court.

The judgment dismissing the case having been entered, the receivers had a right to suppose that nothing further was needed for them to do in the matter, as under no circumstances could an appeal to the State Supreme Court be expected to result in more than the reversal of the judgment maintaining the exception, and remanding the case to be tried on its merits; for the State Supreme Court had appellate jurisdiction only, and no power to compel or receive new pleadings in cases before it.—Const. La. 1879, art. 81.

Under Louisiana law, if the case had come up on its merits, no valid judgment could be rendered against parties who had not pleaded, until judgment by default had been rendered against them:

"If the defendant do not appear either in person or by his advocate after the delay provided by law, the plaintiff may take a judgment by default against him." La. Code of Practice, art. 310.

"Such judgment may be obtained by moving for it in Court, but it consists merely in a statement on the records of the Court, showing that the defendant has failed to appear." —La. Code of Practice, art. 311.

"If, two days after this first judgment has been rendered, defendant neither appear nor file his answer, definitive judg' ment will then be given for the plaintiff, provided he prove his demand. This proof is required in all cases."—La. Code of Practice, art. 312.

VI.

But the *notice* that we have heretofore spoken of as having been served upon one of the receivers, was, in reality, no notice at all to said receivers: nor is it a writ of mandamus, or any known process of court, addressed to them: it is a nondescript order addressed to "Eugene May, recorder of mortgages for the Parish of Orleans." How could the receivers be expected to plead on such a summons?

VII.

We conclude, therefore, that having had no opportunity to plead to the merits or to the jurisdiction in the State Court of original jurisdiction, the receivers, on finding the State Supreme Court decide summarily on all the points on the merits, without remanding the case for further pleading (Rec. p. 17), had a right to shelter themselves under the plea filed by Henry Denis, and to join him in a petition for a writ of error to this Court based on his said plea; and the State Supreme Court evidently so understood it, for it certifies, in refusing the writ of error, that they had taken a chance for a decision in their favor on the merits. (Rec. p. 20.) That chance must have been the one under the plea of Denis to the jurisdiction, for that is the one passed upon by the State Supreme Court, that was not passed upon by the State Court of original jurisdiction.

VIII.

But all this argument has no application to the case here of the plaintiff in error, Henry Denis, for, as we have shown, he did set up his claim for the immunity, and the judgment of the highest Court of the State was against that claim, and therefore he had full right to the writ of error.

IX.

Our opponents say that the plea to the jurisdiction was not heard in the lower Court, and lay great stress upon the allegation made by the Chief Justice of the State Supreme Court, in refusing the writ of error, that on appeal no allusion was made to it and no action of the appellate Court was asked upon it; but they forget that the record shows that this statement of the Chief Justice must be erroneous, for in the final opinion and decree of the Court the plea is expressly mentioned and expressly overruled in these words, viz: "The point made that this Court is without jurisdiction, because receivers have been appointed for the Consolidated Association by the United States Circuit Court, is untenable," etc.—See Record, foot of p. 17 and top of p. 18.

ON THE MERITS.

I.

Our opponents commence their brief on this part of the case by the statement that "it is manifest that this writ of error was taken for delay."

This is also contradicted by the record. There has been no supersedeas applied for or granted in this case, and none could have been, because the final judgment was entered on 1st December, 1884 (p. 16), and the writ of error was not applied for until 15th March, 1885 (p. 18), more than sixty days thereafter. —Rev. Stat. U. S., sec. 1007.

II.

It is next said that neither the Consolidated Association nor Denis have any interest to prevent the cancellation and erasure of the mortgage, yet it appears that the mortgage in question assumed by defendant in error is for the sum of $7500. —Record p. 6.

And the defendant in error assumed all the liabilities of a

stockholder in the Consolidated Association of the Planters of Louisiana (p. 6), which included the price of the shares of that association which have never been paid, and amount to said sum of $7500 (p. 6), and are secured by the mortgage in question. See Acts of Louisiana, 1827, p. 100, sec. 5; Acts of Louisiana, 1828, p. 32, sec. 6.

The testimony of the receiver, alluded to by our opponents, is not to the effect that all the installments of stock have been paid, but he expressly speaks only of the installments due under the Act of Louisiana, No. 100 of 1847, p. 76, which installments were to be sufficient to pay off the liabilities of the association to the State; and that they were not so sufficient is manifest by the decision of the case of Consolidated Association vs. Lord, 35 La. Ann. 425, referred to by our opponents.

III.

It is further asked of this Court that the decision in the Lord case, above referred to, be declared *res adjudicata* as to this case; but that your Honors cannot do, as the parties are not the same, and parties in this case have had no opportunity to put in their evidence.

IV.

It is said that the receiver has no interest, and lends his name to this proceeding, which can result in no benefit to the estate which he administers; but the fact is apparent that if he succeeds in the only Court to which he is responsible he will collect for the creditors of this insolvent corporation, from this defendant in error, the sum of $7500, which will be lost to those creditors unless this writ of error is maintained.

V.

The defendant in error never obtained any authority from the Federal Court to sue its receiver.

"It is a general rule that before suit is brought against a

receiver leave of the court by which he was appointed must be obtained." See Barton vs. Barbour, 104 U. S. Rep., p. 128; Wallace vs. Gray, 16 Wallace, 203, and cases there cited.

We pray that the motions to dismiss and affirm be refused, with costs.

Respectfully submitted.

JOSEPH P. HORNOR,
FRANCIS W. BAKER,
of Counsel.

New Orleans, 26th January, 1886.

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Respectfully submitted

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New Orleans, 26th January, 1886.

27-634

FILED.
FEB 13 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of The United States.

No. 870.

JOHN CALHOUN, RECEIVER OF THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA, AND HENRY DENIS, PLAINTIFFS IN ERROR.

vs.

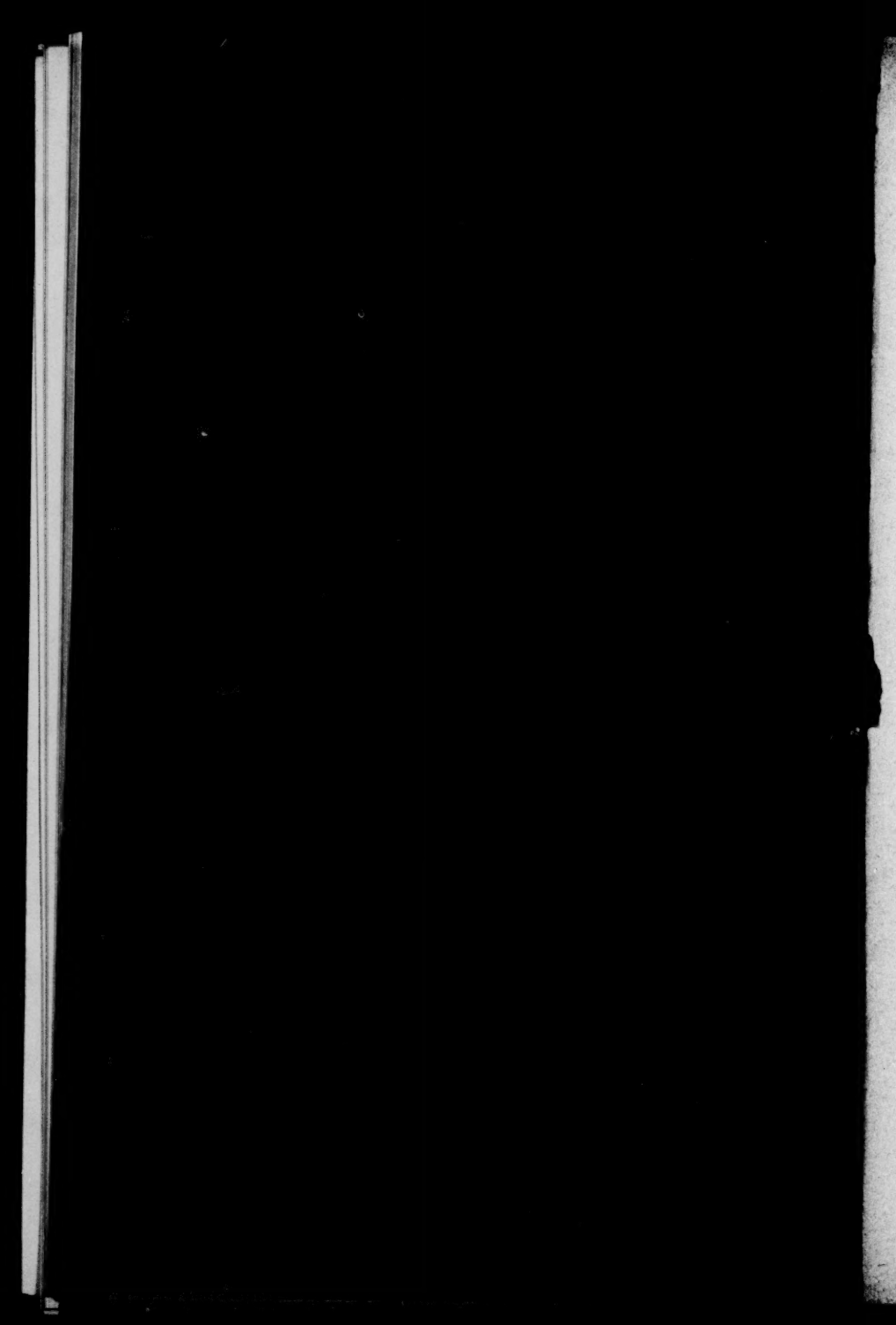
GEORGE ALFRED LANAUX.

In Error to the Supreme Court of the State of Louisiana.

Brief for Defendant in Error, on Motion to Dismiss or Affirm.

B. F. JONAS,

Of Counsel.



Supreme Court of The United States.

No. 870.

JOHN CALHOUN, RECEIVER OF THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA, AND HENRY DENIS, PLAINTIFFS IN ERROR.

vs.

GEORGE ALFRED LANAUX.

In Error to the Supreme Court of the State of Louisiana.

Brief for Defendant in Error, on Motion to Dismiss or Affirm.

In this case, the defendant in error has filed a motion to dismiss or affirm, under rule No. 6 of this Court.

The case is brought here under a writ of error allowed by Mr, Justice Woods, on the 12th day of May, 1885. (Record, page 24).

Application for a writ of error was previously made to the Supreme Court of the State of Louisiana, and refused. (See Record, page 20).

That Court disallowed the writ on the following grounds:

"The exceptions filed by Forstall & Sons and Denis to the jurisdiction of the District Court, were filed after the general issue had been pleaded. They do not appear to have been urged in the lower court, as no evidence was offered to show jurisdiction in the Fifth Circuit Court, Eastern District of Louisiana, and were not passed upon, as the judgment of the lower court dismissed the application on a question of proceeding. On appeal no allusion was made to them, and no action of the Appellate Court was asked on them. The exceptors have taken a chance for a decision in their favor on the merits. After getting one against them, they cannot be allowed the relief now sought. 20 Wallace 414, Mays vs. Fritten. The application for the writ is refused."

(Record, page 29).

The original proceeding was brought by Lanaux (the defendant in error), in the Civil District Court for the Parish of Orleans, Louisiana, by petition asking for a writ of mandamus, to compel the erasure of a certain mortgage on his property, to secure a subscription of $500 each, on fifteen shares of stock in the Consolidated Association of Planters in Louisiana, which originally existing mortgage petitioner alleged had been paid and discharged, actually, and that said payment, so made, had been decided by the Supreme Court of the State to be a full discharge of the said

mortgage, said decision having been rendered in the case of said Association vs. Lord, 35th Louisiana Annual, page 425.

(See petition, Record, page 2).

This mandamus was asked for against the Recorder of Mortgages of the Parish of Orleans, and Henry Denis, L. Godchaux, and E. J. Forstall's Sons, holders of the outstanding bonds issued by the State in favor of the Consolidated Association, were made parties and cited, as were also the State of Louisiana, through its Attorney General, and the Consolidated Association through its Receivers.

See petition and order of Court, and sheriff's returns, pages 3 and 4 of the Record.

The State appeared by the Attorney General and excepted to the petition that the question of the validity of said mortgages could only be determined in proceedings *via ordinaria*, after citation and contradictorily with all parties in interest, and further excepted on the ground that the proceeding was really a suit against the State, and that the State could not be sued without its consent, which it declined to give.

(Record, pages 7 and 8).

The Recorder of Mortgages also excepted to the form of proceeding, which he claimed should be *via ordinaria*.

(Record, pages 8 and 9).

Forstall's Sons and Denis appeared and answered to the petition, first pleading the general issue, and also that the relator "is not entitled to the writ of man-

damus in the premises, and has a full and adequate remedy in the ordinary proceedings of the law."

They also answered, after pleading the general issue, "that this Honorable Court has no jurisdiction of the demand of the relator, because receivers have been appointed to the Consolidated Association of Planters of Louisiana, by the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, and that Court only can entertain jurisdiction of the matter set up by the relator."

(Record, page 9).

The receivers of the Consolidated Association, although cited by personal service on one of them (Thomas J. Burke), did not appear or file any motion, exception, answer, or appearance of any kind in the proceeding.

On the trial, however, Mr. John Calhoun, the other receiver, was the sole witness on behalf of relator, and testified that the installments on the stock which the mortgage was given to secure had been paid and discharged.

(Record, pages 10 and 11).

At the date of service of the petition Burke and Calhoun were both receivers of the Consolidated Association, *Burke was subsequently relieved*, as will appear from the petition of Calhoun to the State Supreme Court for a writ of error, to be found on page 18 of the Record.

Also see order of Court relieving Burke, rendered June 23, 1884.

(Record, page 21).

The petition for mandamus was served on Burke January 31, 1884.

The hearing was had and judgment rendered February 4th, 1884.

The Court sustained the exceptions filed by the State of Louisiana et al., and dismissed the application at Relator's costs. The reasons were orally assigned, and are not found in the Record, but the only exceptions filed were those of the State of Louisiana and the Recorder of Mortgagas, which were to the form of the proceeding and the right to sue the State.

(Record, page 11.)

The Relator appealed from this judgment to the Supreme Court of the State, where, after hearing, the judgment of the lower court was first affirmed.

(See opinion, pp. 14 and 15, Record.)

On application (pages 15 and 16 Record) a rehear- was granted, and the Supreme Court set aside their former decree, reversed the decision of the lower court, and ordered the mandamus to issue as prayed for.

(See Opinion, pages 17 and 18 Record.)

From this decree the present writ of error was allowed by Mr. Justice Woods.

It is respectfully contended that no ground for a writ of error can be found in the Record, and that the same should be dismissed.

No question of the validity of an authority exercised under the United States, was properly made in this

case, if made at all, and there was no decision against the validity of said authority.

There is not the faintest shadow of any other Federal question to be found in the case, and plaintiffs in error must rely entirely upon the plea of Denis and others that the State Court was without jurisdiction, because the Consolidated Association was in liquidation by receivers appointed by the Circuit Court of the United States.

Denis & Forstall's Sons made the plea in their answer after they had first plead a general denial. They had no interest to plead to the jurisdiction, and were without authority to do so for the receivers of the Consolidated Association. They claimed no right under the receivers, but merely set up their title to defeat the claim of Relator.

"This Court has no jurisdiction to review the decision of a State court against a right and title under a Statute of the United States, unless such right and title be specially set up and claimed *by the party for himself, and not for a third party* under whom he does not claim."

Long vs. Converse, 91 U. S., p. 105.

It follows by parity of reasoning that no third party can set up or plead an authority for another, which that other does not plead or urge for himself, especially where as in this case, no interest is shown in either, and the plea is evidently for the purpose of delay, and eventually, with the hope of making a Federal question and securing further delay by writ of error to this Court.

Burke & Calhoun, the receivers, although duly cited, made no appearance, filed no plea to the jurisdiction of the Court, and made no defence to Relator's application. They had no interest to do so, as is shewn by Calhoun's own testimony. Relator had discharged the indebtedness on his property, and was entitled to have the mortgage erased. The State Court had jurisdiction over the Recorder of Mortgages, and the Consolidated Association had no interest and no cause to show why the mortgage should not be erased.

The State Court alone had jurisdiction over the parties for the purpose of the application. The Relator could not have proceeded against the Recorder of Mortgages in the United States Court, for want of jurisdiction, both being citizens of Louisiana, and he was compelled to make the receivers parties. The receivers could have moved the case to the Federal Court. They perhaps could have excepted to the jurisdiction of the State Court so far as their interest was concerned, Having no interest they did neither, but what law prevents an assignee or receiver appointed under the authority of a Federal Court from submitting to the jurisdiction of a State Court, if he thinks proper to do so?

And if he does not think proper to plead to the jurisdiction of the State Court, certainly third parties cannot make this plea for him in order to defeat an action which he has no interest to defend.

The plea made by Denis and Forstalls was not urged in the lower court, and not passed upon, and on appeal no allusion was made to it and no action of the

Appellate Court was asked upon it. This is the positive statement of the Chief Justice of the Supreme Court, embodied in his order refusing the application for a writ of error.

(Record, page 20.)

"Where the consideration of a question is *prima facie* within the jurisdiction of a State Court, such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs—if the person who gave the mortgage becomes bankrupt, and his assignee goes into the State Court, submits to its jurisdiction, and nowhere asserts in any way the rights of the Federal Courts in the matter, he cannot after taking his chance for a decision in his favor, and getting one against him, raise in this Court the point of want of jurisdiction in the State Court."

Mays vs. Fritton. 20 Wallace 414.

This case is perfectly analagous with the above. The receiver raises the question of jurisdiction for the first time in his application to this Court.

Also see 17 Wallace, 19; same, 409, 412; 18 Wallace, 237, 552, 236, 472.

In order to give the Supreme Court jurisdiction the record must show that the point was brought to the attention of the State Court and decided by it. It is not sufficient that the point was in the case and might have been raised and decided.

6 Wall., 382; 6 Wall., 632; 12 How., 165; 18 How., 71; 14 Wall., 216; 9 Wall., 611, 15 Wall., 208; 14 Wall., 15.

The record not only fails to shew that the point was raised and decided, but Chief Justice Bermudez states that it was not urged or even alluded to in the Supreme Court.

"A question presented in the subordinate tribunal will not give jurisdiction unless it is also presented in the appellate tribunal."

Caperton vs. Bowyer, 14 Wallace 216; 98 U. S. 140; 13 Peters 157; 4 Wall 177; 5 Howard 317.

ON THE MERITS.

It is manifest that this writ of error was taken for delay.

Neither the Consolidated Association, nor Denis and others, have any interest to prevent the erasure of the mortgage complained of. The receiver, (one of the plaintiffs in error) has himself testified that all the installments due upon the stock have been paid, except one, which is barred by prescription.

Denis and others, holders of bonds, have no interest, the property being discharged by the payments made from all liability for the further payment of their bonds.

This has been finally decided by the Supreme Court of Louisiana, in the case of Consolidated Association vs. Lord, 35th La. Ann. 425, to which your Honors are respectfully referred for a full history of the consolidated debt.

The present case is precisely similar to that of Lord, and whether this Honorable Court should or should not